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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

RODZINKSI ALLEN,

Defendant and Appellant.

B205164

(Los Angeles County  
Super. Ct. No. TA084884)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Gary E. Daigh, Judge. Affirmed.

Susan K. Keiser, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Jason C. Tran and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Rodzinski Allen of second degree murder, with several firearm findings, and the trial court found that Allen had a prior conviction which qualified as both a strike and a prior serious felony, and that he had a prior conviction with a prison term, and sentenced Allen to an aggregate term of 61-years-to-life. We reject Allen's claims on appeal that his murder conviction is not supported by substantial evidence, and that it is tainted by error attendant with the jury's verdict.<sup>1</sup>

### FACTS

On February 17, 2006, Los Angeles Police Department Officer Jose Reyes, along with Detective Leo Kerchenske and other officers, responded to a report of gunshots at a residence located on East 97th Street where they discovered Warren "Cartoon" Larkin lying on the floor with multiple gunshot wounds, two of which proved to be fatal. No bullet casings were found at the scene, suggesting that the shooter had used a revolver to commit the murder. While at the location, Officer Reyes saw George Roberts, whom the officer knew from prior contacts, standing in a group of 15 or 20 people gathered outside the residence.

On February 23, 2006, police officers arrested Roberts for possession of cocaine. During the drive to the police station, the officers asked Roberts "did [he] just leave the . . . crack house over there," and "did [he] know about the murder," and said that, "if [he] told them about the murder, . . . they would turn [him] loose." When Roberts replied that he knew about the murder, the officers arranged for him to talk to Detective Kerchenske. At the police station, Detective Kerchenske interviewed Roberts, and he provided the following information: On the night of the shooting, Allen, Larkin, and Jimmy Sumlin argued over a drug sale. Allen said that he would be right back and left the house. A moment later, Allen came back and knocked on the side door. Sumlin let Allen into the house, and Allen asked Larkin, "What was all that shit, mother fucker?"

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<sup>1</sup> Allen also filed a petition for writ of habeas corpus alleging newly discovered *Brady* evidence. (See *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).) By separate order, we have issued an Order To Show Cause on Allen's writ petition, returnable in the trial court, to address his *Brady* claim.

Roberts then heard four or five gunshots, and Larkin fell face down on the floor. Allen then fired more shots while Larkin was on the floor. Roberts told Detective Kerchenske that Allen had used a revolver and described Allen as a Black male, five feet eight inches tall, with a ponytail on the back of the head, and a medium built. When Detective Kerchenske showed Roberts an array of photographs, he identified Allen's photograph. Roberts also provided the detective with a written statement in which he identified Allen as the person who had shot Larkin.<sup>2</sup>

On April 4, 2006, Detective Kerchenske interviewed Jimmy Sumlin at the police station, and Sumlin provided the following information: Larkin and "Pooky's cousin" sold drugs and had an argument, and Pooky's cousin shot Larkin. Sumlin had met the shooter a few times before that day. Sumlin said that the shooter came into the house, pointed a gun at Sumlin's stomach, and then turned and shot Larkin. After shooting Larkin, the shooter again pointed the gun at Sumlin, and then he left.<sup>3</sup>

In July 2007, the People filed an information charging Allen with Larkin's murder (Pen. Code, § 187), with ancillary allegations that he personally used a firearm, personally discharged a firearm, and personally discharged a firearm causing great bodily injury. (Pen. Code, § 12022.53, subds. (b), (c), & (d).) The pleading further alleged that Allen had been convicted of assault with a firearm in 1989, a strike offense that also qualified as a prior serious felony (Pen. Code, § 1170.12, subds. (a)-(d), § 667, subds. (b)-(i), & § 667, subd. (a)(1)), and that he had been convicted of a drug offense in 2001 for which he served a prison term, within the meaning of Penal Code section 667.5, subdivision (b). At a jury trial in November 2007, witnesses Sumlin and Roberts both refused to identify Allen as the shooter, and both claimed that any information which they provided to Detective Kerchenske in their interviews during the police investigation

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<sup>2</sup> The videotape of Roberts's interview with Detective Kerchenske was played for the jury at trial. A transcript of the videotaped interview was also provided to the jury.

<sup>3</sup> A redacted audiotape of Sumlin's interview with Detective Kerchenske was played for the jury at trial. A redacted transcript of the taped interview was also provided to the jury.

of the murder was not true. Detective Kerchenske then testified about his interviews with Sumlin and Roberts, and audio and video recordings of the interviews were introduced. (See footnotes 1 and 2.)

On November 21, 2007, the jury returned a guilty verdict on the lesser included offense of voluntary manslaughter, and a blank verdict form on the murder count. The trial court then instructed the jurors that before they could return a verdict on the lesser offense of manslaughter, they were required to find Allen not guilty of the greater offense of murder. Shortly thereafter, the jury returned a verdict finding Allen guilty of murder, with a finding that the murder was in the second degree, and with true findings on all of the firearm allegations.

On December 14, 2007, the trial court sentenced Allen to aggregate term of 61 years to life as follows: 15 years to life for the murder conviction, doubled to 30 years to life for the prior strike conviction, plus a term of 25 years to life for discharging a firearm causing great bodily injury, plus a consecutive 5-year enhancement for a prior serious felony conviction, plus a consecutive 1-year enhancement for the prior conviction with a prison term.

## **DISCUSSION**

### **I. Allen's Murder Conviction is Supported by Substantial Evidence**

Allen contends his murder conviction must be reversed because the jury's finding that he was the shooter is not supported by substantial evidence. More specifically, Allen argues the out-of-court identifications provided by witnesses Roberts and Sumlin during their pretrial interviews with Detective Kerchenske are not sufficiently reliable to amount to substantial evidence. We disagree.

When a criminal defendant presents us with a challenge to the sufficiency of the evidence in support of his or her conviction, our task is to determine whether, in light of the whole record, a rational trier of fact could find the elements of the offense beyond a reasonable doubt. (*People v. Sanchez* (1995) 12 Cal.4th 1, 31-32.) In undertaking this task, we are not inflexibly barred from considering a witness's out-of-court identification as substantial evidence in support of the defendant's conviction. (See *People v. Cuevas*

(1995) 12 Cal.4th 252, 263-272.) As the Supreme Court has explained, various factors “may attend an out-of-court identification and affect its probative value.” (*Id.* at p. 267.) Examples of these factors include (1) the identifying witness’s prior familiarity with the defendant; (2) the witness’s opportunity to observe the perpetrator during the commission of the crime; (3) whether the witness has a motive to falsely implicate the defendant; and (4) the level of detail given by the witness in the out-of-court identification and [in the] description of the crime. (*Ibid.*)

After examining the out-of-court identifications provided by Roberts and Sumlin, we are not prepared to declare that they are insufficient to support Allen’s conviction for murder. The only real issue implicated by Allen’s arguments on appeal is the identity of the shooter. On that issue, neither of the two out-of-court identifications is so lacking in substance and credibility to compel a conclusion that they are insufficient to sustain Allen’s conviction. According to their out-of-court statements, Roberts and Sumlin both had visited the residence where the shooting occurred on a number of prior occasions, and both had seen Allen on prior occasions. Although the accounts given by Roberts and Sumlin conflicted with regard to a handful of ancillary details, they complemented each other when it came down to the shooting: there had been an argument, and Allen had left the residence, then returned, and shot Larkin.

Allen’s attack on the out-of-court identifications is little more than a veiled request to our court to reweigh the evidence and to reject the jury’s assessment that Roberts’ and Sumlin’s out-of-court identifications of Allen as the shooter were more believable than their in-court refusals to identify Allen as the shooter. Although we acknowledge the shortcomings in the out-of-court identifications highlighted by Allen, we may not on appeal substitute our assessment of the credibility of witnesses in place of the jury’s assessment. (*People v. Roa* (2009) 171 Cal.App.4th 1175, 1180.)

To the extent Allen argues he was not able to cross-examine the out-of court identifications, he focuses on the wrong element of the evidence. Statements are not cross-examined; the witnesses who made those statements are cross-examined. Allen was not denied an opportunity to confront both Roberts and Sumlin, and the reliability of

their out-of-court identifications were properly tested by their presence and questioning, in court, at Allen's trial. (*People v. Cuevas, supra*, 12 Cal.4th at p. 273.) Further, the lack of corroborating physical evidence such as fingerprints or ballistics materials does not mean that Roberts' and Sumlin's identifications must be deemed insufficient as a matter of law. (*Id.* at p. 272.)

## **II. The Verdict Forms Issue Does Not Compel A Manslaughter Conviction**

Allen contends his second degree murder conviction must be reversed because the trial court "forced" the jurors to reconsider their original voluntary manslaughter verdict. In a related vein, Allen contends the jury "impliedly acquitted" him of the greater murder charge at the instant it returned the voluntary manslaughter verdict. He claims double jeopardy immediately affixed to the greater murder charge at the instant the voluntary manslaughter verdict was handed to the judge, which means the jurors were prohibited from any further consideration of the greater murder charge, and thus were prohibited from returning the murder verdict. Allen contends the trial court was required to "accept the jury's verdict on manslaughter" at the moment it was returned, which we understand to be an argument that he should stand convicted of the lesser offense of voluntary manslaughter. He is mistaken.

### **A. The Trial Setting**

Before submitting the cause for deliberations, the trial court instructed the jurors in accord with the 2006 version of CALCRIM No. 641 which provided that, if they agreed Allen was not guilty of murder, but agreed he was guilty of voluntary manslaughter, then they were to "complete the verdict form stating the defendant [was] guilty of voluntary manslaughter. Do not complete a verdict form stating the defendant is guilty of voluntary manslaughter unless you all agree that the defendant is not guilty of murder."<sup>4</sup> During its deliberations, the jury submitted the following question to the court:

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<sup>4</sup> Although CALCRIM No. 641 instructs the jury not to complete a verdict form stating the defendant is guilty of voluntary manslaughter unless they "all agree that the defendant is not guilty of murder," the instruction does not specifically instruct the jury to

“Do we all have to agree on murder or manslaughter? Do we have to be unanimous?

If murder, then do we have to be unanimous as [to] 1st or 2nd degree?”

The trial court answered the jury’s question with the following written response:

“The jury must be unanimous of guilty or not guilty of murder. If unanimous of guilty of murder, must decide whether it is first or second degree murder—must be unanimous for first degree. [¶] If not guilty of murder, jury then decides if it is manslaughter, and the guilty or not guilty must be unanimous.”

Shortly thereafter, the jury indicated that it had reached a verdict, and, on returning to the courtroom, delivered all of the verdict forms to the trial court. After reviewing the verdict forms, the court asked the jurors to go back to the deliberation room because it “need[ed] to talk to the lawyers about something. . . .” The court then told the prosecutor and defense counsel that the jury had voted guilty on voluntary manslaughter, and found the firearm allegations to be true, but had “not filled out any [verdict] form relating to the murder.” The trial court advised the lawyers that it could not accept a guilty verdict on a lesser offense unless there was also a verdict form on the greater offense. When Allen’s defense counsel agreed with the trial court’s assessment of the verdict form matter, the court proposed to instruct the jury that the court could not accept the verdict unless they voted not guilty on the greater offense. Allen’s defense counsel agreed with the court’s suggested procedures for addressing the matter.

The trial court then informed the jury that it had difficulty with the jury forms, and specifically instructed the jurors as follows: “The defendant was charged with the greater crime of murder. Manslaughter is a lesser crime. It appears that you voted guilty of the lesser crime. I can’t [ac]cept a guilty verdict on a lesser crime unless you vote not guilty all unanimously of the murder count. So I’m going to send you back and have you

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complete a not guilty verdict form on the murder charge at the same time it fills out the manslaughter guilty verdict form.

further deliberate. You can use these forms. You can tear them up. We can get you four new ones, whatever you want. But I can't accept a verdict form as to this. . . ."

The jury retired to the deliberation room, and, 30 minutes later, returned a verdict form on which it found Allen guilty of second degree murder, with firearm findings.

## **B. Analysis**

The "acquittal-first" rule requires a jury to acquit a defendant of a greater offense before rendering a verdict on a lesser offense. (*People v. Fields* (1996) 13 Cal.4th 289, 309-310 (*Fields*); and see also *People v. Kurtzman* (1988) 46 Cal.3d 322.) When a jury returns a guilty verdict on a lesser offense and is silent on a greater offense, there may be an "incomplete verdict" under the law and the instructions. (*Fields, supra*, at p. 310.) The Supreme Court addressed this issue and the proper procedures to be employed in such an "incomplete verdict" situation in *Fields, supra*, 13 Cal.4th 289, in the context of double jeopardy rules, and its teachings now guide us in Allen's current case.

In *Fields*, the defendant was charged with gross vehicular manslaughter while intoxicated and vehicular manslaughter while intoxicated, and a jury returned verdicts on the lesser offense but reported itself deadlocked on the greater offense. The trial court declared a mistrial, the People retried the defendant, and a jury found him guilty at the second trial. Division Seven of our court reversed the convictions from the second trial on double jeopardy grounds. The Supreme Court affirmed Division Seven's judgment.

In finding a double jeopardy prohibition to the second trial, the Supreme Court was called upon to consider the interplay between the "implied acquittal doctrine" in the situation of a jury's guilty verdict on a lesser offense, and the "manifest necessity" doctrine which justifies a retrial where a jury deadlocks. The court held that, when a jury *expressly* deadlocks on the greater offense, but returns a guilty verdict on a lesser offense, the conviction on the lesser does not embody an implied acquittal on the greater offense, and the People may retry the greater offense without running afoul of double jeopardy. At the same time, the court explained that, when a jury returns only a guilty verdict on a lesser offense, and the People bring the "incomplete verdict" to a trial court's attention, the trial court may refuse to accept and record the verdict and may order the jury to

resume its deliberations. However, once a trial court accepts a verdict on a lesser offense and the jury is discharged, the defendant stands convicted of the lesser offense, and a retrial is barred by Penal Code section 1023. (*Fields, supra*, 13 Cal.4th at pp. 302-311.)

In Allen’s current case, there was no act by the trial court which “forced” the jury to return a conviction on the greater offense. On the contrary, the court merely instructed the jury that they could not return a verdict on the lesser manslaughter offense alone. In addition, nothing in the trial court’s use of the instructional procedures which it employed, with the agreement of Allen’s counsel, conflicts with *Fields*. In short, we see no coerced verdict, and no error in the procedural mechanics of Allen’s trial relating to the return of the jury’s verdict.

To the extent that Allen’s arguments on appeal are more specifically focused on a double jeopardy claim — i.e., that he could not have been placed twice in jeopardy on the murder charged once the jury returned its verdict on the lesser manslaughter offense, we disagree with his analysis. This case leaves no room for application of “implied acquittal” concepts. The problem for Allen is that his jury was not discharged upon returning the verdict on the lesser manslaughter offense, and he forfeited any double jeopardy claim by failing to raise such an objection when the court ordered the jury to resume its deliberations, and, instead, expressly agreed with and consented to the trial court’s decision to direct the jury to continue its deliberations. (Cf. *People v. Scott* (1997) 15 Cal.4th 1188, 1201 [a defendant’s failure to enter a plea of once in jeopardy constitutes a waiver, and the issue may not be raised for the first time on an appeal following conviction].)<sup>5</sup>

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<sup>5</sup> To avoid forfeiture, Allen argues his double jeopardy claim may be examined via a claim that his trial lawyer’s failure to assert the issue constituted ineffective assistance of counsel. We reject Allen’s ineffective assistance claim because, had his trial lawyer raised a double jeopardy claim, the trial court would have rejected the objection in accord with *Fields*. In other words, there was no ineffective assistance of counsel because a double jeopardy objection would have been futile.

**DISPOSITION**

The judgment is affirmed.

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BIGELOW, J.

We concur:

FLIER, Acting P. J.

MOHR, J.\*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.